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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-720

ANTONIO CRUZ VAZQUEZ,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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November 5, 1979

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## Supreme Court of the United States

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—v.—

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

The petitioner Antonio Cruz Vazquez respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming the judgment of conviction entered against the petitioner by the United States District Court for the Eastern District of New York.

**Opinions Below**

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at pp. 1-29. No opinion was rendered by the District Court for the Eastern District of New York.

### **Jurisdiction**

The date of the judgment of the United States Court of Appeals for the Second Circuit was August 24, 1979, which was also the date of entry. A timely petition for rehearing *en banc* was denied on October 5, 1979. A 40. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

### **Questions Presented**

1. Whether the sealing provisions in the federal wiretap statute can override the policy expressed in a State's statutory limits on the duration of a wiretap order.
2. Whether an explanation for a delay in sealing tapes was properly characterized as satisfactory when the Government's own version does not support the reasons professed by the court.

### **Constitutional and Statutory Provisions Involved in the Case**

1. United States Constitution, Amendment IV: The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.
2. Title 18 U.S.C. § 2518(8)(a). See Appendix p. 37.
3. New Jersey Statutes Annotated, 2A:156A-14. See Appendix p. 37.
4. Title 18 U.S.C. § 2518(5). See Appendix p. 37.

5. New Jersey Statutes Annotated 2A:156A-12(f). See Appendix p. 38.

6. New Jersey Statutes Annotated 2A:156A-10(f). See Appendix p. 38.

### **Statement of the Case**

The petitioner Antonio Cruz Vazquez was tried in the Eastern District of New York before the Hon. Jacob Mishler and a jury and was convicted on a three-count indictment of conspiring to distribute heroin, contrary to 21 U.S.C. § 846; of possessing heroin with intent to distribute, contrary to 21 U.S.C. § 841(a)(1); and of an offense of participating in a continuing criminal enterprise under 21 U.S.C. § 848. Vazquez was sentenced to a term of imprisonment of fifteen years and a special parole term pursuant to the provisions of § 848 and was fined \$125,000.

The prosecution arose out of the seizure of a large quantity of heroin from an apartment in the city of New York early in 1978. Vazquez was linked with this seizure by the introduction into evidence, over the objections of the defense, of the contents of intercepted telephone conversations. These conversations suggested that Vazquez who had been living in Las Vegas, Nevada, during the relevant period was connected with the importation of heroin from Mexico into Arizona and thence to New Jersey and New York. Apart from the tapes of these conversations there was no direct evidence of Vazquez's participation in the events that led to the seizures and arrests in New York. The tapes yielded arguably incriminating statements and were the major theme of the prosecutor's summation.

The applications for the wiretap orders were made by officials of the State of New Jersey to a New Jersey court.

Numerous orders and extensions were obtained for different wires and these are tabulated in the opinion of the Court of Appeals. A 12. In all some 208 tapes were involved but the great majority of those that had any relevance to the petitioner were on the wire of a co-defendant, Antonio Gonzalez. The first order on the Gonzalez wire was procured on July 5, 1977, with extensions on July 22 and August 1. As required by the New Jersey statute, a second, fresh order was issued on August 11, 1977, which, under New Jersey law, terminated, on August 31, 1977. The 114 tapes recorded under these orders and extensions were not judicially sealed until September 13, 1977.

Pre-trial and on appeal the defense made an attack on several aspects of the wiretap warrants and procedures, notably on the delay in sealing which is the issue advanced in this petition. In explanation for the failure to obtain immediate judicial sealing of the tapes, as required by both the federal and the New Jersey statutes (A 37-39), the Government presented pre-trial an affidavit from Jack Hill, Esq., an Assistant Prosecutor in the County of Hudson, State of New Jersey. This affidavit is reproduced in the Appendix at pp. 30-36.

The affidavit alleged a medley of reasons for the delay in sealing. A need existed to duplicate the original tapes and this process was protracted because of a shortage of recorders (A 32); then all duplicates had to be checked for completeness and audibility which was a slow process since the language on the tapes was Spanish. But it appears that this preparatory work was completed by August 17th, although sealing was not effected until September 13th.

In explanation for the extraordinary further procrastination the affidavit asserts that on August 17th the investi-

gators learned that the judge who had issued the orders was on vacation and would not return until August 25th. However they delayed considerably even after the judge's return since, as noted, the tapes were not presented for sealing until September 13th. The Court of Appeals dismissed the judge's vacation as an unacceptable element in the explanation but nevertheless managed to hold that the delay in sealing had been satisfactorily explained.

The Court of Appeals for the Second Circuit arrived at its holding by reasoning initially that the delay was at worst one of 13 days since the duty to seal did not accrue until the expiration of the second order. Taking the delay to be 13 days the Court of Appeals then held that this was satisfactorily explained by the reasons having to do with the preparation of the tapes for sealing. It is contended in this petition that the Court of Appeals was wrong in law in determining the date on which the duty to seal accrued and that its reading of the explanation is contradicted by the face of the Government's own explanatory affidavit.

#### **Reasons for Granting the Writ**

This case presents compelling reasons for granting the writ for it squarely raises the question of the relationship between federal and state rules in the license and control of wiretapping. Further, it presents an important question on the interpretation of the federal statute not yet passed upon by this Court. For both these reasons an authoritative response to the questions raised here would make an important contribution to clarity in the understanding of the permissible scope of wiretapping.

## I

**The Decision Below Improperly Ignores the Expressed Intention of a State Legislature to Restrict Wiretapping More Severely Than Does the Federal Statute.**

Both the federal wiretap statute and the New Jersey statute require judicial sealing of the tapes or the furnishing of a "satisfactory explanation" for the absence of sealing in substantially the same terms. 18 U.S.C. § 2518(8)(a); N.J. Stat. Ann. § 2A:156A-14. A 37-38. Under the federal statute this sealing must be effected "immediately upon the expiration of the period of the order, or extensions thereof." *Id.* The Second Circuit Court of Appeals has interpreted this section to mean that in a federal wiretap situation the duty to seal accrues at "the termination date of the continuous period of interception of a given telephone, regardless of the number or length of judicial orders that have been issued to authorize that surveillance." A 13.

This fixing of the time when the duty to seal arises has come about in the light of the general federal provisions for issuing wiretap orders and extensions to those orders contained in 18 U.S.C. § 2518(5). A 37. This section permits the issuance of 30-day orders and 30-day extensions and places no limit on the number of orders or extensions that may be issued to authorize continuation of a given interception. The rule adopted in the Second Circuit as to the accrual of the duty to seal is thus a conclusion derived from the conjunction of Sections 2518(5) and 2518(8)(a).

What should be the impact of a narrower license afforded by a state statute or the decisions of a state court? This must surely depend on the way in which the state narrows the federal understanding. The New Jersey statute limits the period of the original order to 20 days after which only

two extensions, each of 10 days, is permitted. New Jersey Statutes Ann. 2A:156A-12(f). A 38. After this total period of 40 days has elapsed the state authorities must make an application showing fresh probable cause if they wish to justify further interceptions. New Jersey Statutes Ann. 2A:156A-10(f). A 38-39. Thus New Jersey is substantially less generous than the federal law in permitting extensions of an original order.

In the present case the Second Circuit Court of Appeals nevertheless held that the date on which the duty to seal arose under the New Jersey statute was at the conclusion of all continuous eavesdropping on a particular wire, even though this encompassed not only the period of one order and its extensions but (as in this case) the contiguous periods of two different orders.

To justify this holding the Court of Appeals relied on its own earlier decision in *United States v. Sotomayor*, 592 F.2d 1219 (2d Cir.), cert. denied, 47 U.S.L.W. 3786 (U.S. June 4, 1979). But in *Sotomayor* the court was dealing with the New York statute where both the provisions on issuing and extending orders and the provision on sealing were virtually identical with the federal ones. The only conflict in *Sotomayor* was with the New York Court of Appeals who in *People v. Washington*, 46 N.Y.2d 116, 412 N.Y.S.2d 854 (1978), had interpreted the state statute to require repeated acts of sealing at the end of each order or extension period considered separately. *Sotomayor* proceeded on the principle that the federal courts in the area of wiretapping should defer to state restrictions, absent in the federal understanding, only when these restrictions are "designed to protect an individual's right of privacy", 592 F.2d at 1225 and that questions of the construction of a sealing provision do not implicate so central an interest.

Whether or not *Sotomayor* is correct need not be argued here for that decision cannot justify the holding in the present case and should not be extended to apply to this case. Here the New Jersey statute differed from the federal one in a way that was patently designed as a direct protection of privacy by imposing more rigorous requirements for obtaining wiretap orders. Here, therefore, the proper question to ask is whether the sealing provision is significantly connected with the provisions that confine the duration of orders and extensions. Such a significant connection does exist.

The state statute, unlike the federal one, creates a definite terminus at the end of a period of an order and two extensions and then demands a fresh start. The concept of sealing goes naturally with the terminus of a period of interception. Prompt sealing ensures, for example, that no interception can be passed off as occurring at a substantially earlier date. This is especially important in New Jersey since it is more difficult to obtain a new order than it is to obtain an extension in federal practice. If sealing is only demanded at the end of all orders plus extensions plus new orders, as the Court of Appeals held, this will undermine the verification of the New Jersey provisions that there is to be a sharp halt at the end of forty days and that the prosecution offer fresh probable cause before there is a continuation of interception. There are no New Jersey cases on the question of when the duty to seal attaches but this is the natural and reasonable interpretation of the New Jersey statute.

Furthermore, it is a natural interpretation of the federal sealing provision as applied to the New Jersey provisions on issuing orders and extensions. For the federal statute, § 2518(8)(a), speaks of the duty to seal arising "upon the

expiration of the period of the order or extensions thereof."

A 37. While *Sotomayor* can be justified under this provision, since the New York provisions on orders and extensions are the same as the federal ones, the present case cannot. New Jersey is clear that an order and its extensions terminate after forty days. The Court of Appeals stretched the federal rule on a Procrustean bed and arrived at the strange conclusion that 40 means 80 or 120 or whatever.

By taking this road the Court of Appeals concluded that the duty to seal the tapes intercepted under the Gonzalez wire did not arise until the end of the second order, August 31, so that the eventual sealing on September 13 was 13 days late. A proper understanding leads one to the conclusion that a duty to seal arose, for those tapes already intercepted, on August 11 when the last extension permitted by the state statute expired, so that the delay was in fact 33 days.

Thus there is a double vice in the holding of the Court of Appeals. In the first place it rudely ignores the implications of an expressed state preference for stricter standards for wiretapping than are contained in the federal statute. In this way it impermissibly interferes with the freedom of the state to make such judgments and also gives an unnecessary liberality to wiretap procedures. Second, it involves a tortured and quite implausible interpretation of the plain enough language of the federal sealing provision.

**II**

**The Decision Below Characterizes the Explanation for Delay as Satisfactory for Reasons That the Record Demonstrates to Be Without Foundation.**

The Court of Appeals, having adopted a standard (here contended to be improper) by which the worst delay in sealing the tapes amounted to 13 days, then relied on the affidavit by Prosecutor Hill, (A 30), to identify a satisfactory explanation for the delay. The explanation was held to be satisfactory (though a "close question") because it rested on factors having to do with difficulties in readying the tapes for sealing because of shortages of equipment and personnel. *Id.*

But the Court of Appeals misapprehended or overlooked certain inescapable implications of the Hill affidavit, that make it clear that, of the 114 tapes judicially sealed on September 13, 90 had been prepared and were ready for judicial sealing by August 17. A 35. (These 90 tapes contained the bulk of the conversations introduced into evidence by the Government.) The reason given why these tapes were not timely sealed had nothing to do with shortages of equipment or personnel, but related solely to the fact that the judge who had issued the wiretap order was on vacation for part of the period—a reason that the Court of Appeals itself found unacceptable. A 34.

Even assuming that 24 of the 114 tapes were not ready for sealing on August 17 and conceding *arguendo* that the Court of Appeals was correct in setting the date on which the duty to seal arose as August 31, there was no reason given why the prosecutor held back 80 percent of the tapes from sealing for two weeks except that the other 20 percent were not yet ready. To regard such an explanation as

satisfactory will dangerously subvert the statute, for prosecutors could always explain the failure to seal tapes on the ground that some preparatory work still had to be done on some minute fraction of the aggregate.

Furthermore, the story presented in Hill's affidavit makes it very difficult to credit the contention that it took 13 days to ready 24 tapes, when the affidavit asserts that the preceding 90 tapes were prepared for sealing in 7 days. The affidavit states that on August 10, Investigator Duffy was assigned to prepare 90 tapes for sealing and that he completed this by August 17. (A 35) There is no explanation or suggestion in the affidavit as to why it might have taken twice as long to prepare one quarter of the number of tapes. The allegations of shortage of men and equipment do not relate to the special delay with the 24 tapes but rather go to the question of delay in general terms.

### **CONCLUSION**

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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November 5, 1979

# **APPENDIX**

**Opinion in the Court of Appeals  
for the Second Circuit**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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Nos. 678, 694, 695, 706, 707—August Term, 1978.

(Argued February 26, 1979

Decided August 24, 1979.)

Docket Nos. 78-1366, 78-1370, 78-1378,  
78-1379, 78-1398

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UNITED STATES OF AMERICA,

*Appellee*,

—v.—

ANTONIO CRUZ VAZQUEZ, BENITO LUIS CORTINA,  
ANTONIO GONZALEZ, ANDRES RENE RAPPARD, and  
JOSE DE LE FE-QUINTAS,

*Appellants*.

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Before:

FEINBERG, TIMBERS and MESKILL,  
*Circuit Judges*.

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Appeals from judgments entered in the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge*, convicting appellants of narcotics-related offenses. The Court of

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Appeals held that delays preceding the judicial sealing of tapes recorded during the electronic surveillance of certain telephone lines were satisfactorily explained and did not necessitate suppression of the intercepted conversations, and that there was probable cause for the issuance by a New Jersey court of orders authorizing such interception.

Affirmed.

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*Opinion in the Court of Appeals for the Second Circuit*

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**MESKILL, Circuit Judge:**

Antonio Cruz Vazquez, Benito Cortina, Antonio Gonzalez, Andres Rene Rappard, and Jose De La Fe-Quintas appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge.* Appellant Vazquez was convicted, after a jury trial, of conspiring to distribute heroin, in violation of 21 U.S.C. § 846; possessing with intent to distribute 44 pounds of heroin, 21 U.S.C. § 841(a)(1); and conducting a continuing criminal enterprise, 21 U.S.C. § 848. Cortina, Gonzalez, Rappard and De La Fe were convicted only on the conspiracy count—Cortina and Gonzalez after a jury trial, Rappard and De La Fe after guilty pleas.<sup>1</sup> Each has been sentenced to a term of imprisonment and a special parole term; in addition, Vazquez and Gonzalez have been fined.<sup>2</sup>

<sup>1</sup> With the agreement of the government and the approval of the court, Rappard and De La Fe preserved the right to appeal the district court's denial of their motions to suppress certain wiretap evidence. See *United States v. Price*, slip op. 2657, 2658 n.1 (2d Cir. May 18, 1979), and cases cited therein.

<sup>2</sup> Vazquez was sentenced on the criminal enterprise count to a term of 15 years' imprisonment, lifetime special parole, and a \$25,000 fine, and on the possession count to a term of 15 years' imprisonment (concurrent) and a \$100,000 fine. Cortina was sentenced to a term of 15 years' imprisonment and a special parole term of 15 years. Gonzalez was sentenced to a term of 10 years' imprisonment, a special parole term of 15 years, and a \$25,000 fine. Rappard was sentenced to a term of 5 years' imprisonment and a special parole term of 10 years. De La Fe was sentenced to a term of 3 years' imprisonment and a special parole term of 7 years.

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I. Background

The issues raised by the appeals before us do not necessitate a detailed elaboration of the complex and extensive narcotics operation in which appellants participated.<sup>3</sup> Briefly, the government presented evidence showing that, with the help of an airline employee stationed in Arizona, participants in the conspiracy imported from Mexico large quantities of heroin and exported, in exchange, large sums of cash. The evidence indicated that the heroin was then transferred from the western states to New York or New Jersey, where it was ultimately sold.

Although the government called many witnesses and introduced many exhibits, a great deal of trial time was devoted to presenting to the jury, over the objections of the defendants, the contents of various intercepted telephone conversations in which one or more of the conspirators had participated.<sup>4</sup> The

<sup>3</sup> No challenge has been made to the sufficiency of the evidence presented to support the verdicts rendered as to the three appellants who proceeded to trial: Vazquez, Gonzalez and Cortina.

<sup>4</sup> The intercepted conversations were conducted almost entirely in Spanish. Although none of the jurors spoke Spanish, tapes of a few key conversations were played in court. On these occasions, the jurors were given transcripts of English translations of the conversations. These transcripts did not identify the speakers. The jurors were permitted to read along, and to make notes if they wished to do so, while an agent on the witness stand read aloud government-prepared English translations, identifying the various speakers as he read. On other occasions, the playing of the Spanish tapes was omitted but the rest of the procedure remained the same.

No challenge to the accuracy of either the transcriptions or the translations has been made. Appellant Cortina, however, does challenge the district court's decision to allow the government to proceed in this manner. Judge Mishler cautioned the jury to evaluate the testimony bearing on the accuracy of the transcription, the translation from the Spanish, and the iden-

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federal statute governing wiretapping<sup>5</sup> both restricts the availability of this singularly intrusive investigative technique and imposes a number of obligations on those federal or state authorities who are involved in its authorization, implementation or supervision. Failure to comply with certain of the procedures specified necessitates the suppression of the evidence obtained.<sup>6</sup> Thus, in reviewing the district court's decision not to exclude the challenged evidence, we must closely examine the route by which the intercepted conversations got into court in order to determine whether the statutory pre-conditions to its admission were satisfied.

On July 5, 1977, an investigator representing the Narcotics Strike Force of the Hudson County, New Jersey, Prosecutor's Office applied to Judge Arthur J. Blake of the New Jersey Superior Court for an order authorizing the interception of certain wire communications pursuant to the New Jersey Wiretap-

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tification of the speakers, and he made clear that the transcripts were to be used only as aids: "The mere fact that it is in typewritten form does not mean you must accept it . . . [The transcripts] are merely guides, subject to assessment by you as to the accuracy and the weight to be given . . ." Tr. at 890. Under these circumstances, we cannot agree with Cortina's contention that the procedures followed deprived him of a fair trial. Cf. *United States v. Lam Lek Chong*, 544 F.2d 58, 71 (2d Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States v. Chiarizio*, 525 F.2d 289, 294 (2d Cir. 1975); *United States v. Marin*, 513 F.2d 974, 977 (2d Cir. 1975); *United States v. Koska*, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971).

<sup>5</sup> Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§ 2510 et seq.

<sup>6</sup> See *id.* §§ 2518(10)(a) and 2518(8)(a); but see *United States v. Donovan*, 429 U.S. 413 (1977).

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ping and Electronic Surveillance Control Act.<sup>7</sup> The investigator's supporting affidavit stated that the Prosecutor's Office had obtained information from several sources (including interviews with confidential informants, visual surveillance of suspects, and examination of telephone company records) linking the use of four New Jersey telephones with the operation of a large narcotics conspiracy controlled by appellant Vazquez. According to the affidavit, the Prosecutor's Office was of the view that electronic surveillance of four specified telephones would reveal information concerning the imminent shipment of a large quantity of heroin into the New York-New Jersey area. On the basis of this affidavit, the adequacy of which is discussed in part III of this opinion, Judge Blake issued an order dated July 5th, 1977, authorizing 20-day wiretaps on the four telephones, the last four digits of which are 0027, 9462, 5693, and 5699. On July 22, 1977, the New Jersey Superior Court authorized a 10-day extension of these four wiretaps, effective that day, on the basis of an affidavit that both incorporated the original July 5th affidavit and included information gathered through interceptions under the initial order. On August 1, the New Jersey court authorized a second 10-day extension of the initial order on the basis of an affidavit that again incorporated the earlier affidavits and set forth information gathered during prior interceptions. On August 11, 1977, the Prosecutor's Office sought and received a new order authorizing 20-day interceptions on the same four telephones. Again the supporting affidavit in-

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corporated all previous affidavits and set forth new information gathered during previous interceptions.

On August 31, 1977, yet another 20-day order was issued.<sup>8</sup> Because service had been terminated on one of the four tapped telephones, number 9462, no authorization was sought for continued interception of that line. However, the affidavit submitted to the New Jersey court by the Prosecutor's Office stated that new information had been obtained indicating that telephone number 6299 was emerging as a focal point for communications between the subjects of the investigation, and authorization was sought and received for the initiation of a wiretap on this number. On September 19, a 10-day extension was sought as

<sup>8</sup> Appellant Cortina argues that it was improper for the court to issue two consecutive 20-day orders without first authorizing two 10-day extensions of the earlier 20-day order. We are aware of no New Jersey case on point, but we see nothing in the New Jersey statute to support this proposition. Given that the standards governing the issuance of a 20-day order are *higher* than those pertaining to 10-day extensions, and given that the Prosecutor's Office met these stricter requirements, even assuming that the New Jersey courts would interpret the law in the manner suggested by Cortina, we fail to see how he could have been prejudiced by the challenged procedure. See N. J. Stat. Ann. 2A:156A-10(f), which states:

Upon consideration of an application, the judge may enter an ex parte order . . . authorizing the interception of a wire or oral communication, if the court determines on the basis of the facts submitted by the applicant that there is or was probable cause for belief that:

In the case of an application, other than a renewal or extension, for an order to intercept a communication of a person or on a facility which was the subject of a previous order authorizing interception, the application is based upon new evidence or information different from and in addition to the evidence or information offered to support the prior order, regardless of whether such evidence was derived from prior interceptions or from other sources.

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to three of the four phones covered by the August 31 order,<sup>9</sup> and on September 29 a second extension was authorized covering these three lines.

No further orders or extensions were sought in connection with this investigation until January 3, 1978. A 20-day order issued on that date authorized the wiretapping of three previously untapped telephone lines, numbers 3016, 6656, and 7511. On January 23 a 10-day extension order was issued authorizing the continued interception of lines 3016 and 6656. After the expiration of this extension, all wiretap activity relevant to the instant appeals ceased. All intercepted conversations had been recorded on tape;<sup>10</sup> the wiretaps conducted pursuant to the orders and extensions just enumerated generated over 200 reels of tape.

9 The affidavit supporting this application stated that "in order to minimize the interception of communications to the fullest extent possible," no extension was being requested to cover number 0027. Although drug related conversations had been intercepted on line 0027, the Prosecutor's Office was of the opinion that no information regarding the particular activities on which the investigation had become focused would be lost by termination of the 0027 wiretap. Thus, the September 19 extension covered only numbers 5693, 5699 and 6299.

10 Both the federal statute and the New Jersey act require such recording. Section 2518(8)(a) of the federal statute provides in part:

The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device.

Similarly, N. J. Stat. Ann. 2A:156A-14 provides in part:

Any wire or oral communication intercepted in accordance with this act shall, if practicable, be recorded by tape, wire or other comparable method.

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## II. The Sealing of the Tapes

The argument most vigorously pressed by all five appellants, and the only one requiring extended discussion, focuses on what happened *after* the intercepted conversations were recorded. Appellants contend that the government should not have been permitted to rely on any of the tapes recorded during the interceptions described above because unacceptable delays preceded the judicial sealing of these tapes.

Both the federal wiretap statute and the corresponding New Jersey Statute require the "immediate" judicial sealing of tapes recorded in the course of a wiretap, and under the terms of both statutes the admissibility of such tapes into evidence is conditioned upon the presence of a judicial seal or the offer of a satisfactory explanation for its absence.<sup>11</sup> Federal and state courts have interpreted

11 Section 2518(8)(a) of 18 U.S.C. provides in part:

"Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recording shall be wherever the judge orders.

... Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

Section 2517(3) of 18 U.S.C. provides:

Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence

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such sealing provisions to require, by implication, a satisfactory explanation even when a judicial seal is present, if such seal was not obtained "immediately." See, e.g., *United States v. Ricco*, 566 F.2d 433, 435 (2d Cir. 1977), cert. denied, 436 U.S. 926 (1978); *United States v. Gigante*, 538 F.2d 502, 506 (2d Cir. 1976); *State v. Cerbo*, 78 N.J. 595, \_\_\_, 397 A.2d 671, 674 (1978). We have had occasion before to discuss the importance of the sealing provisions of the federal act.

Congress, in enacting Title III's sharply detailed restrictions on electronic surveillance, intended to "ensure careful judicial scrutiny throughout" the process of intercepting and utilization of such evidence. . . .

The immediate sealing and storage of recordings of intercepted conversations, under the supervision of a judge, is an integral part of this statutory scheme. Section 2518(8)(a) was intended to "insure that accurate records will be kept of intercepted communications". . . . Clearly all of the carefully planned strictures on the con-

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while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

Section 2A:156A-14 of the New Jersey Statutes provides in part:

Immediately upon the expiration of the order or extensions or renewals thereof, the tapes, wires or other recordings shall be transferred to the judge issuing the order and sealed under his direction. Custody of the tapes, wires or other recordings shall be maintained wherever the court directs. . . . Duplicate tapes, wires or other recordings may be made for disclosure or use pursuant to . . . this act. The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire or oral communication, or evidence derived therefrom, under . . . this act.

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duct of electronic surveillance . . . would be unavailing if no reliable records existed of the conversations which were, in fact, overheard.

*United States v. Gigante*, *supra*, 538 F.2d at 505 (citations omitted). *Gigante* held that where tapes have not been properly sealed, suppression is appropriate even in the absence of any showing that the tapes have been altered. The Court reasoned that to condition suppression of improperly sealed tapes on a showing of tampering would controvert the language of the statute and would vitiate the congressional purpose. But see *United States v. Cohen*, 530 F.2d 43, 46 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *United States v. Sklaroff*, 506 F.2d 837, 840 (5th Cir.), cert. denied, 423 U.S. 874 (1975); *United States v. Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

The 208 tapes here at issue were judicially sealed in three groups. On September 13, one hundred fourteen reels were sealed; on October 17, an additional twenty-one reels were sealed; and on February 9, 1978, the final seventy-three tapes were sealed by order of Judge Blake. The chronology of events crucial to our calculation of the sealing delays involved in this case is set out in a chart in the margin.<sup>12</sup>

The parties disagree not only as to whether the sealing delays incurred in this case were justified, they disagree as well as to how these delays are to be calculated. We note at the outset that the measurement of a particular sealing delay and the determination of whether that delay requires suppression of a wiretap tape otherwise admissible in a

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12 See following page.

<u>Phone Number</u>	<u>Subscriber</u>	<u>July 5, 1977</u>	<u>July 22, 1977</u>	<u>Aug. 1, 1977</u>	<u>Aug. 11, 1977</u>	<u>Aug. 31, 1977</u>	<u>Sept. 19, 1977</u>
0027	J. Sanchez	ORDER #1 First Extension	Second Extension	ORDER #2 Termination	ORDER #3 Termination	ORDER #3 Termination	Termination*
9462	A. Gonzalez	ORDER #1 First Extension	Second Extension	ORDER #2 Termination	ORDER #3 Termination	ORDER #3 Termination	Termination*
5693	D. Nunez	ORDER #1 First Extension	Second Extension	ORDER #2 Termination	ORDER #3 First Extension	ORDER #3 First Extension	First Extension
5699	D. Nunez	ORDER #1 First Extension	Second Extension	ORDER #2 Termination	ORDER #3 First Extension	ORDER #3 First Extension	First Extension
6299	J. M. Gonzalez						
6656	O. Milian						
7511	M. Docal						
3016	J. L. Nunez						

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<u>Phone Number</u>	<u>Sept. 29, 1977</u>	<u>Oct. 9, 1977</u>	<u>Jan. 3, 1978</u>	<u>Feb. 2, 1978</u>	<u>Date of Sealing</u>	<u>Number of Days Between Termination and Sealing</u>
0027					9/13/77	[No delay]*
9462	Second Extension	Termination			9/13/77	13
5693	Second Extension	Termination			9/13 & 10/17/77	8
5699	Second Extension	Termination			9/13 & 10/17/77	8
6299	Second Extension	Termination			10/17/77	8
6656					2/9/78	7
7511					2/9/78	7
3016					2/9/78	7

\* It appears from the record that surveillance on the 0027 line had ceased by September 13 although interception was authorized to continue until September 19. No tapes from the 0027 line were introduced at trial.

\*\* No tapes from the 7511 line were introduced at trial, and the parties agree that the delay in the sealing of these tapes is not at issue.

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federal trial are matters of federal law.<sup>13</sup> *United States v. Sotomayor*, 592 F.2d 1219, 1223-26 (2d Cir.), cert. denied, 47 U.S.L.W. 3786 (U.S. June 4, 1979). Cf. *United States v. Turner*, 558 F.2d 46, 49 (2d Cir. 1977) ("This is a federal prosecution, and federal law determines whether suppression is appropriate."). Thus, tapes sealed in compliance with the federal standards are admissible in federal court regardless of whether under applicable state law the tapes have been properly sealed. Under federal law, sealing delays are to be measured from the termination date of the continuous period of interception of a given telephone, regardless of the number or length of judicial orders that have been issued to authorize that surveillance. *United States v. Scafidi*, 564 F.2d 633, 641 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978); *United States v. Fury*, 554 F.2d 522, 533 (2d Cir.), cert. denied, 433 U.S. 910 (1977). Section 2518(5), which permits the issuance of 30-day orders and 30-day extensions, places no limit on the number of orders or extensions that may be issued to authorize continuation of a given interception, provided, of course, that all statutory conditions are met.<sup>14</sup> Therefore, the duration of "the period of

13 We express no opinion as to how the New Jersey courts would measure the sealing delays involved in this case or whether they would view these delays as requiring suppression of the tapes.

14 18 U.S.C. § 2518(5) provides:

No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by

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the order, or extensions thereof," will depend in each case on the authorizing judge's determination of the length of time interception is justified. And it is only the "expiration" of this "period of the order, or extensions thereof," that triggers the sealing requirement of § 2518(8)(a).<sup>15</sup>

Sotomayor turned on the distinction "between procedures governing the interception of wiretap evidence and those governing the preservation of such evidence after interception for trial."<sup>16</sup> 592 F.2d at 1225.

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subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

15 In interpreting the federal statute in this manner in *United States v. Fury*, this Court noted that Congress had clearly not chosen to institute a sealing procedure sufficiently rigorous to preclude all possibility of tampering. Viewing the common sense reading of the statute to require sealing only after the expiration of the second (and last) 30-day extension of a 30-day wiretap order issued by a New York judge, the Court explained:

There is, of course, some logic in the proposition that the purpose of the sealing provisions would be better served if the tapes were sealed every thirty days rather than at the end of ninety days. Carried to its ultimate conclusion, however, tampering with the tapes could only be guarded against if they were sealed by a judge at the end of each day. The statute does not require this. Whatever tampering could be done in ninety days could be done in thirty days. As a practical matter, sealing every thirty days would not be a significantly better safeguard than the system used [here].

*United States v. Fury*, 554 F.2d 522, 533 (2d Cir.), cert. denied, 433 U.S. 910 (1977).

16 Sotomayor involved four wiretaps authorized by New York state courts and carried out by New York law enforcement of-

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We believe that . . . in determining whether to admit a wiretap obtained by a state officer acting under a state court order issued pursuant to a state statute, [we are required] to apply only those more stringent state statutory requirements or standards that are designed to protect an individual's right of privacy, as distinguished from procedural rules that are essentially evidentiary in character.

. . . Since a state's protection of privacy normally reflects principles central to its social and governmental order, our failure to respect its more stringent protection of privacy rights would not only violate principles of federalism, but encourage state and federal law enforcement

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ficers. The applicable New York statute, like the federal statute, permits the issuance in proper circumstances of 30-day orders and unlimited 30-day extensions. N. Y. Crim. Proc. §§ 700.30(7) and 700.40. However, in contrast to the federal statute, the New York statute, as interpreted by the state's highest court, calls for immediate sealing after each order or extension authorizing interception. *People v. Washington*, 46 N.Y.2d 116, 412 N.Y.S.2d 854, 385 N.E.2d 593 (1978). The Sotomayor Court held that because the tapes resulting from each tap were sealed within one day of the termination of the last order or extension authorizing that tap, the tapes would not be suppressed, despite the fact that under New York law many of the tapes had not been timely sealed. For example, one of the Sotomayor taps was initiated on September 22, 1976, and was terminated December 2, 1976. Extensions of the original order had been granted on October 22 and November 5. All tapes from this tap were sealed on December 2. Under New York law, the sealing obligation arose upon the expiration of the initial order and upon the expiration of each extension. Thus, tapes made pursuant to the initial order required sealing "immediately" as of October 22 under New York law but required sealing "immediately" as of December 2 under federal law.

As an alternative ground for its decision the Sotomayor Court noted that retroactive application of the New York case authoritatively construing the state statute would not be appropriate. *United States v. Sotomayor*, 592 F.2d 1219, 1226-27 (2d Cir. 1979), citing *People v. Washington*, *supra*.

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officials to by-pass state law and to engage in federal forum-shopping . . . . On the other hand, rules pertaining to the admissibility of evidence are ordinarily governed by the law of the forum.

*Id.* (footnotes omitted). This reasoning dictates the same result in the instant case. The New Jersey courts have had little occasion to interpret the state wiretap statute, and we are aware of no case precisely on point. Whether the sealing obligation of the New Jersey statute is eventually interpreted as attaching upon the expiration of each separate order or extension, as in New York, or as attaching only upon the termination of the entire period of interception of a particular telephone, as in the federal courts, we must be guided by federal law in this area. In contrast to the federal act,<sup>17</sup> the New Jersey statute permits issuance only of 20-day orders and 10-day extensions.<sup>18</sup> Furthermore, under the New Jersey statute only two 10-day extensions of a particular 20-day order may be issued. To obtain authorization for the continuation of a wiretap beyond the period covered by an order and the two permitted extensions thereof, law enforcement officials must apply for a new order. By setting the standards for issuance of a 20-day order higher than those governing issuance of a 10-day extension,<sup>19</sup> and by permitting the issuance of only two extensions of each order, the New Jersey legislature has established a method somewhat dif-

<sup>17</sup> As noted above, the federal statute permits issuance of 30-day orders and unlimited 30-day extensions, where appropriate. 18 U.S.C. § 2518(5), quoted in note 14, *supra*.

<sup>18</sup> N. J. Stat. Ann. 2A:156A-12(f).

<sup>19</sup> N. J. Stat. Ann. 2A:156A-10(f). See note 8, *supra*.

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ferent from that chosen by Congress for protecting against unwarranted interceptions. Under *United States v. Sotomayor*, *supra*, 592 F.2d at 1223-26, this choice, insofar as it affects the validity of an order issued by a New Jersey judge, will be respected by the federal courts. However, New Jersey's policy choice regarding the authorization of continuous wiretaps cannot logically be viewed as affecting the approach to be taken by the federal courts in assessing the adequacy of the sealing of the tapes obtained in the course of those taps.

We interpret the phrase "period of the order, or extensions thereof," in the sealing provision of the federal statute, § 2518(8)(a), to encompass a continuous authorized wiretap in its entirety, regardless of whether the judicial orders authorizing the initiation or continuation of the tap are denominated "orders," "extensions," "renewals," or "continuations." To interpret federal law otherwise would result in permitting the timeliness of the sealing of tapes offered in evidence in federal court to be determined by a state decision to label orders authorizing the continuation of wiretaps by any term other than the term "extension." Such a result, although in no way increasing the protection afforded individual privacy, would diminish federal control over evidentiary procedures in the federal courts. Keeping in mind the principles enunciated in *United States v. Sotomayor*, *supra*, we deem it most unlikely that Congress intended such a result. Therefore, we conclude that the term "extensions," as used in the phrase "period of the order, or extensions thereof" is to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however

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designated, where the surveillance involves the same telephone, the same premises, the same crimes, and substantially the same persons. See *United States v. Scafidi, supra*, 564 F.2d at 641; cf. *United States v. Principie*, 531 F.2d 1132, 1142 n.14 (2d Cir. 1976), cert. denied, 430 U.S. 905 (1977). It follows that the sealing obligation under federal law is not accelerated by New Jersey's method of authorizing the continuation of a wiretap beyond the period of the initial order.

Having determined that the sealing obligation attached, under federal law, on the date each tap terminated, we can now calculate how long the sealing of the eight sets of tapes generated by the eight wiretaps was delayed.<sup>20</sup> The delays relevant to this appeal range from 7 to 13 days:

Wiretap	Date of Termination <sup>21</sup>	Dates of Sealing <sup>22</sup>	Days of Delay
*0027	Sept. 19, 1977	9/13	[0]
9462	Aug. 31, 1977	9/13	13
5693	Oct. 9, 1977	9/13 & 10/17	8
5699	Oct. 9, 1977	9/13 & 10/17	8
6299	Oct. 9, 1977	10/17	8
6656	Feb. 2, 1978	2/9/78	7
*7511	Jan. 23, 1978	2/9/78	[17]
3016	Feb. 2, 1978	2/9/78	7

\*As explained in note 12, *supra*, the delays in sealing the 0027 and 7511 tapes are not at issue here.

20 We reject the government's argument, apparently accepted by Judge Mishler, that the attempted unilateral "sealing" of the tapes by the investigators themselves, outside the presence of the court, can satisfy the statutory command that the tapes "be made available to the judge . . . and sealed under his directions." Although certainly all reasonable precautions against

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The law is clear that if no explanation had been offered for these delays we would be obliged to reverse, as a sealing achieved one to two weeks after expiration of a wiretap cannot be considered "immediate." Cf. *United States v. Gigante, supra*, 538 F.2d 502 (8 to 12 month delays). The cases illustrate that sealing is often possible within one or two days. See, e.g., *United States v. Sotomayor, supra*, 592 F.2d at 1221. Thus, in our view, any delay beyond that certainly calls for explanation. Unfortunately,

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tampering should be taken both before and after judicial sealing is accomplished. see, e.g., *United States v. DePalma*, 461 F.Supp. 800, 826-29 (S.D.N.Y. 1978), such procedures do not substitute for the presence of a "seal as provided for by this subsection." 18 U.S.C. § 2518(8)(a) (emphasis added).

21 There is no dispute between the parties concerning the dates on which the various wiretaps were terminated. Thus, we need not address the important question of how sealing delays are to be calculated in those cases where, pursuant to the minimization requirements of the governing statute, a tap is terminated before the expiration of the maximum period of interception authorized by the final order issued in regard to that tap. Although this was the case with line 0027, appellants do not claim that this wiretap was terminated prior to the day of sealing. In any case, no tapes from this line were introduced at trial. Compare *United States v. Principie*, 531 F.2d 1132, 1142 (2d Cir. 1976), cert. denied, 430 U.S. 905 (1977) (discussing notification provision, § 2518(8)(d) with *United States v. Ricco*, 421 F.Supp. 401, 406-07 (S.D.N.Y. 1976), aff'd, 566 F.2d 433 (2d Cir. 1977), cert. denied, 436 U.S. 926 (1978).

22 In some instances, tapes generated by the same wiretap were sealed at different times. In our view, the government's decision to obtain judicial sealing of some tapes *prior* to termination of the relevant tap did not accelerate its obligation to obtain sealing of the remainder of the tapes. A contrary ruling would needlessly discourage the government from exceeding the minimal standards set by the statute in those instances where it could otherwise do so. Cf. *United States v. Fury, supra*, 554 F.2d at 533 ("[S]ince it would not be a hardship for the government to seal the tapes after each [order or extension], it might seriously consider adopting such a practice.")

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 there is no clear consensus as to what constitutes a "satisfactory explanation," under the statute, for a less-than-immediate sealing.

No evidence was offered to controvert the affidavit submitted by the government at the suppression hearing or the testimony of task force agents at trial regarding the carrying out of the wiretapping. The task force experienced shortages in both qualified personnel and equipment. Surveillance on each wire was conducted 24 hours a day and as many as five lines were monitored at any given time. Because the great majority of the conversations intercepted were conducted in Spanish, it was necessary, in order to observe the minimization requirements of the New Jersey statute,<sup>23</sup> to have at least one agent fluent in Spanish monitoring the tapes on each 8-12 hour shift. Although the Prosecutor's Office borrowed Spanish-speaking agents from other law enforcement agencies, only four qualified agents were available. An attempt was made to record both original tapes and duplicate tapes simultaneously but because too few tape recorders were available, even after borrowing, this was possible less than half the time. Due to round-the-clock use, the tape recorders required frequent repair work. Further, because personnel and equipment were engaged in the monitoring and recording process, machines and personnel were not always available to duplicate those tapes for which

<sup>23</sup> Section 2A:156A-12 of the New Jersey statute provides in part:

Every order entered under this section shall require that such interception begin and terminate as soon as practicable and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this act.

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 no duplicates had been made during the interception itself. And because the Spanish speaking personnel were engaged in monitoring conversations, they were not always available to spot-check the duplicate tapes for audibility. In addition, during the effective period of each order or extension, strike force personnel needed to gain sufficient familiarity with the tapes to enable them to decide which tapes should be continued and which should be terminated.<sup>24</sup> Each application for continued authorization of a tap contained information obtained during the effective period of the prior order or extension so that the issuing judge would have sufficient information on which to base a determination that continued surveillance was justified. This on-going evaluation of the conversations intercepted made further demands on the personnel and equipment available. Finally, the fact that over 200 reels of tape required duplicating, labeling, and checking made difficult the prompt preparation of the tapes for sealing.

Although the question is close, in our view the circumstances just detailed provide a satisfactory explanation for the 7 to 13 day sealing delays. When the wiretaps were first instituted, the government had reason to believe that the investigation would be quickly concluded, as their information indicated that a drug shipment was due to arrive in the area. Had the evidence needed been gathered during the first week or two of surveillance, perhaps the personnel

<sup>24</sup> That the obligation to discontinue non-essential taps was recognized and respected is evidenced by the fact that the Prosecutor's Office on its own initiative terminated the 0027 tap several weeks before the close of the initial phase of the investigation. Similarly, no extension was sought for the 7511 tap during the final phase. See note 12, *supra*.

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and equipment on which the project depended would have been able to handle the necessary monitoring, duplication and transcription without incurring delays in sealing. In the circumstances of this case, where we discern on the government's part no bad faith, no lack of diligence, and no attempt to gain an advantage over the defendants, we believe that the government's lack of foresight regarding the actual scope of the investigation does not justify the exclusion of probative evidence lawfully obtained.

Congress has explicitly established "two possible prerequisites to the use of wiretap evidence—the presence of a judicial seal, or a satisfactory explanation of its absence . . ." *United States v. Gigante, supra*, 538 F.2d at 506 (emphasis added). Unless we are to read the second alternative out of the statute, we must decide in each case whether the explanation tendered can be deemed "satisfactory." In the instant case, although the delays were not minuscule, neither were they of *Gigante* proportions. In this Circuit delays of comparable length have been deemed excusable in some circumstances and inexcusable in others. Compare *United States v. Scafidi, supra*, 564 F.2d 633 (7-day delay excused); *United States v. Fury, supra*, 554 F.2d at 533 (6-day delay excused); *United States v. Poeta*, 455 F.2d 117 (2d Cir.), cert. denied, 406 U.S. 948 (1972) (13-day delay excused); *United States v. Alois*, 449 F.Supp. 698 (E.D.N.Y. 1977) (5-day and 7-day delays excused); *United States v. Caruso*, 415 F.Supp. 847 (S.D.N.Y. 1976), aff'd, 553 F.2d 94 (2d Cir. 1977) (24-day and 42-day delays excused) with *United States v. Ricco*, 421 F.Supp. 401 (S.D.N.Y. 1976), aff'd, 566 F.2d 433 (2d Cir. 1977), cert. denied, 436 U.S. 926 (1978) (pre-

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Sotomayor, applying New York law, 12-day or 13-day delay not excused). See also *United States v. Angelini*, 565 F.2d 469 (7th Cir. 1977), cert. denied, 435 U.S. 923 (1978) (9-day, 26-day and 38-day delays excused); *United States v. Sklaroff, supra*, 506 F.2d 837. Taken together, the factors discussed above appear to us to explain adequately the delays incurred.<sup>25</sup>

However, in law as in life, today's satisfactory explanation may very well be tomorrow's lame excuse. As the federal and state case law in this area grows, the failure to foresee and, where possible, prevent sealing delays becomes less justifiable, as law enforcement officials must be expected to learn from their own experiences and those of others. As other courts have done, "we decline to allow the police to rely on their own failure to use proper equipment or to institute more efficient procedures as an excuse for delay." *People v. Washington*, 46 N.Y.2d 116, 124, 412 N.Y.S.2d 854, 859, 385 N.E.2d 593, 597 (1978). The wiretapping statute imposes a duty on the judiciary as well as on the prosecutor. It is our role to exclude from evidence tapes not sealed in conformance with the law, and we are aware that by faithfully performing this statutory duty we encourage law enforcement officers to perform their

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25 We fail to see the relevance of an additional factor relied on by the government in attempting to explain the sealing delays. The absence of the judge in mid-August has little bearing on delays which occurred in September and later months. In addition, after *United States v. Poeta*, 455 F.2d 117 (2d Cir.), cert. denied, 406 U.S. 948 (1972), and *United States v. Fury, supra*, 554 F.2d 522, it should be clear that in the courts of this Circuit, tapes sealed by a judge other than the "issuing judge," because of the absence or unavailability of the latter, are considered properly sealed.

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duties in an equally rigorous manner. For this reason, we will continue to scrutinize wiretap cases with care, and will not hesitate to exclude evidence when exclusion is appropriate.

### III. Probable Cause

Not only do appellants contend that the wiretap tapes were improperly sealed, they argue, in addition, that this evidence was improperly obtained. Appellants claim that the affidavits supporting the wiretap authorization orders failed to establish probable cause for the interceptions and that Judge Mishler erred in denying defense motions to suppress the tapes on this ground.

The New Jersey statute<sup>26</sup> permits a state judge to enter an *ex parte* interception order if the court

26 The adequacy of the warrant applications must be tested against both federal and applicable state law. *United States v. Sotomayor*, *supra*, 592 F.2d at 1225 and n.13. Although there is a paucity of case law interpreting the New Jersey statute, what there is suggests that we may draw on the many cases interpreting the almost identical federal act which permits issuance of a wiretap order, when, *inter alia*.

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in . . . this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

18 U.S.C. § 2518(3). Cf. *State v. Sanchez*, 149 N.J.Super. 381, 394, 396-97, 373 A.2d 1028, 1034, 1035 (Super. Ct. Law Div.

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determines on the basis of the facts submitted by the applicant that there is probably cause to believe *inter alia* that:

(a) The person whose communication is to be intercepted is engaging or was engaged over a period of time as a part of a continuing criminal activity or is committing, has or had committed or is about to commit an offense as provided in . . . this act;

(b) Particular communications concerning such offense may be obtained through such interception;

(d) The facilities from which, or the place where, the wire or oral communications are to be intercepted, are or have been used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by, such individual . . .

N.J. Stat. Ann. 2A:156A-10. We are not the first court that has been called upon to evaluate the challenged affidavits under the statutory standards. A neutral and detached magistrate, Judge Blake of the New Jersey Superior Court, concluded that these affidavits established probable cause for his issuance

1977) (drawing on federal cases in interpreting notice provision of New Jersey statute; “[t]he New Jersey wiretap statute is closely modeled after the federal statute;” although the New Jersey act contains “a significant number of specific additional requirements beyond those embodied in the federal wiretap statute, this court finds that they do not negate the stated intent of the Legislature to generally pattern the New Jersey statute on the federal standards and safeguards incorporated in 18 U.S.C. [§] 2518(1) *et seq.*”).

*Opinion in the Court of Appeals for the Second Circuit* of the several orders requested, and such a determination is to be accorded substantial deference. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *United States v. Gomez Londono*, 553 F.2d 805, 810 (2d Cir. 1971); *State v. Murphy*, 137 N.J.Super. 404, 420, 349 A.2d 122, 131 (Super. Ct. Law Div. 1975), *rev'd on other grounds*, 148 N.J.Super. 542, 372 A.2d 1315 (Super. Ct. App. Div. 1977). Judge Mishler has also carefully reviewed the challenged affidavits and has found them to be more than adequate. Our own study of the affidavits leads us to the same conclusion.

No purpose would be served by setting out in detail the contents of these lengthy affidavits. Suffice it to say that each one provided ample factual material on which to base a determination of probable cause. The information presented in the initial 37-page affidavit was gathered from several sources, including tips from three confidential informants. Considerable evidence was provided to support the affiant's conclusion that the informants were reliable. Two had previously supplied the Prosecutor's Office with information concerning drug-related activity and this information had been corroborated by the investigators and found to be correct. See *Aguilar v. Texas*, *supra*; *Jones v. United States*, 362 U.S. 257, 271 (1960); *United States v. Rueda*, 549 F.2d 865, 870 (2d Cir. 1977); *United States v. Edmonds*, 535 F.2d 714 (2d Cir. 1976); *United States v. Fantuzzi*, 463 F.2d 683, 687-88 (2d Cir. 1972). Cf. *United States v. Fiorella*, 468 F.2d 688, 691-92 (2d Cir. 1972), *cert. denied*, 417 U.S. 917 (1974). The information given by the third informant was confirmed by a DEA agent. Significantly, the statements

*Opinion in the Court of Appeals for the Second Circuit* provided by the confidential informants to some extent corroborated one another. Furthermore, the Prosecutor's Office had, where possible, verified details of the informants' stories in order to ensure that the tips were based "on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli v. United States*, 393 U.S. 410, 416 (1969); *United States v. Edmonds*, *supra*, 535 F.2d at 720. Cf. *United States v. Dunloy*, 584 F.2d 6 (2d Cir. 1978). Although some of the information had been gathered in the early stages of the investigation, there was ample indication that the criminal activity was of an ongoing nature and that the information was therefore still pertinent. *State v. Murphy*, *supra*, 137 N.J.Super. at 421; 349 A.2d at 131-32. Moreover, appellants' contention that the affidavit was defective due to certain omissions is without merit. We agree with Judge Mishler that assuming that the omitted facts are true and that their omission was intentional, they would not be material to a determination of probable cause. Therefore no hearing on this issue was necessary.<sup>27</sup> Cf. *Franks v. Delaware*, 438 U.S. 154 (1978); *United States v. Steinberg*, 525 F.2d 1126, 1131 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). Viewed as a whole, the initial affidavit was sufficient to establish probable cause to believe that by tapping the target phones investigators could intercept communications between the members of the alleged drug conspiracy and that those conversations would relate to that conspiracy.

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<sup>27</sup> For the same reason we must reject Cortina's challenge to the search warrant pursuant to which incriminating evidence, later introduced at trial, was seized from his New York apartment.

*Opinion in the Court of Appeals for the Second Circuit*

The subsequent affidavits, all of which incorporated new information gleaned during the most recent interceptions, also clearly met the standard set by statute.<sup>28</sup>

Defendants correctly observe that wiretapping is "not to be routinely employed as the initial step in criminal investigation," *United States v. Giordano*, 416 U.S. 505, 515 (1974). The New Jersey statute provides that a wiretap application shall include, in addition to the requirements just discussed:

A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ

....

N. J. Stat. Ann. 2A:156A-9(c)(6).<sup>29</sup> However, "the purpose of the statutory requirements is not to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents; rather, they only require that the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods." *United States v. Hinton*, 543 F.2d 1002, 1011 (2d Cir.), cert.

28 See N. J. Stat. Ann. 2A:156A-10(f), quoted in note 8, *supra*.

29 Compare the federal requirement that an application show that:

normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous . . .

18 U.S.C. § 2518(3)(c).

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denied, 429 U.S. 980 (1976). See also *United States v. Fury*, *supra*, 554 F.2d at 529-30; *United States v. Steinberg*, *supra*, 525 F.2d at 1130. The challenged affidavits were clearly sufficient in this regard. As Judge Mishler stated:

The affidavit details the standard investigative techniques that were utilized prior to the wiretap application and indicates the paucity of admissible evidence resulting therefrom.

Prior to resorting to wiretapping, the Prosecutor's Office had interviewed informants, both confidential and identified; had undertaken physical surveillance; and had checked bank, telephone, motor vehicle, public utilities and police records; and yet, had been unable to gather sufficient evidence to arrest the conspirators.

The district court correctly concluded that the challenged wiretap orders were properly issued.

The judgments of conviction are affirmed.

**Affidavit of Jack Hill**

UNITED STATES DISTRICT COURT  
 EASTERN DISTRICT OF NEW YORK  
 78 CR 67(S)

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UNITED STATES OF AMERICA

—against—

ANTONIO CRUZ VAZQUEZ, a/k/a "Nico", et al.,

*Defendants.*

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STATE OF NEW JERSEY,  
 COUNTY OF HUDSON, ss.:

**AFFIDAVIT**

JACK HILL, being duly sworn, deposes and says:

1. I am an Assistant Hudson County Prosecutor and I am Legal Advisor to the Hudson County Prosecutor's Narcotics Strike Force. In that capacity, I supervised the wiretap investigation which is related to the charges now before the Court. I am submitting this affidavit upon information and belief, the source of which is personal knowledge and information supplied to me by members of the Narcotics Strike Force. My purpose is to inform the court of the procedures followed with respect to the sealing of the original tapes recorded during this investigation.

2. The wiretap phase of this investigation can be divided into two parts. The first period of wiretaps lasted from

***Affidavit of Jack Hill***

July 5, 1977, to October 9, 1977, and was conducted under authority of three separate orders:

- (1) The original order, dated July 5, 1977, for a period of twenty days, and two ten-day extensions, dated July 22, 1977, and August 1, 1977, respectively.
- (2) The first renewal order, dated August 11, 1977, for a twenty-day period.
- (3) The second order, dated August 31, 1977, and two ten-day extensions, dated September 19 and September 29, 1977, respectively.

The second period of wiretaps from January 3, 1978, to January 28, 1978, was conducted under two orders:

- (1) An order, dated January 3, 1978, for a 20-day period and one ten-day extension, dated January 23, 1978.
- (2) An order, dated January 12, 1978, for a twenty-day period.
3. As soon as interceptions under each of the four orders and extensions terminated, members of the Narcotics Strike Force engaged in a full-scale effort to prepare the tapes for sealing. Under my supervision, they duplicated the original tapes, monitored the duplicates for completeness and audibility and completed various administrative duties. Although preparation of the tapes for sealing presented special problems in this case owing to the scope of the wiretap investigation and the fact that the intercepted conversations were in Spanish, it is my belief that there was no unnecessary delay in presenting the tapes for sealing.

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4. One reason for delay was the need to duplicate the original tapes in order to have a complete set for use during the investigation and any subsequent prosecution. At the termination of each of the four wiretap orders, an inventory of duplicates was prepared. In each case it was found that only one-third to one-half of the reels had been duplicated during the course of the wiretap. The reason was that even after borrowing heavily from other law enforcement agencies, including the Federal Drug Enforcement Administration and the New Jersey State Police, the Narcotics Strike Force was able to obtain only a total of seven reel-to-reel tape recorders. During the course of each wiretap, four of the seven were used 24-hours each day to record conversations on the target telephones. One machine was held as a back-up machine to facilitate non-stop recording in the face of repeated problems with overheating and blowouts in the four main machines. Thus, when the wiretap was in progress, only two machines were available for other uses, including the duplication of originals. There were heavy competing demands for these machines and only rarely were as many as two machines available for duplication. Thus, one machine was often needed to transcribe important conversations intercepted earlier for use in the investigation and for preparing new affidavits. Moreover, throughout most of the wiretap period, machines were needed by members of the Narcotics Strike Force for a gambling wire and for unrelated trial preparation and grand jury presentations. Thus, even with diligent effort, the investigator charged with preparing duplicates had to reproduce one-half to two-thirds of the reels after the wiretap ended. Beginning at that time and recording full time at 1 $\frac{1}{8}$  speed, it took him several days in each case to reproduce the full set of reels.

*Affidavit of Jack Hill*

5. A second reason for delay in sealing was the need to spot check all duplicates for completeness and audibility. This, of course, had to be done in the period after the duplicates were prepared. Spot checking was done in the following manner: the investigator, by use of the logs, located several pertinent conversations on each duplicate reel and listened to them to verify that the duplicate was complete and that the conversations could be understood. Inasmuch as the conversations were in Spanish, it was necessary to use investigators who spoke Spanish, and this created a problem. During the wiretap periods the entire Strike Force had access to only four Spanish-speaking investigators. (Spanish-speaking personnel were borrowed from other law enforcement agencies.) However, with four ongoing wires that had to be monitored on a 24-hour basis, only one Spanish-speaking investigator was available for other work, including spot checking duplicates. This created an additional bottleneck and delayed sealing.

6. At the time the January wiretap was terminated with the arrests and seizures on January 28, the problems were somewhat different. Then personnel and equipment that would normally have been available for duplication and spot-checking were diverted to other duties and other jurisdictions. Thus, two Spanish-speaking investigators and several machines were dispatched to the United States Attorney's Office in the Eastern District of New York to prepare the case for grand jury presentation there. At the same time, the Strike Force supervisor, Lt. Daniel Doherty, who is bilingual, was needed to supervise arraignments in New Jersey and to prepare complaints, and arrest and search warrants. A second Spanish speaking investigator had by this time departed to a new assignment in Florida.

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Even before the January wire was terminated, resources were severely strained. Thus, when it became clear from intercepted conversations that a deal was about to be made, the Narcotics Strike Force enlisted all available personnel, borrowing heavily from Drug Enforcement Administration and the State Police as well, to man surveillance teams. Even though there were no ongoing wiretaps in January, manpower and equipment shortages produced delays in sealing.

7. Some additional delay was caused by the availability of the issuing judge. Thus, on or about August 10, 1977, the last day of interceptions under the initial order, I contacted the office of the issuing judge, the Honorable Arthur J. Blake, Assignment Judge, Superior Court of New Jersey, Essex County, and spoke to a member of his staff. I was told to prepare the tapes and the appropriate paperwork and then contact the judge for an appointment. Investigator James Duffy was assigned, in addition to his other duties, to prepare the tapes for sealing. A group of 90 tapes was prepared and sealed by Investigator Duffy on August 17. On that date, Judge Blake's office was contacted and it was learned that Judge Blake was on vacation in California and would not return to his office until after August 25. Since, by statute, the original tapes must be ordered sealed by the issuing judge, the sealed tapes were placed in the Narcotics Strike Force safe by Investigator Duffy for Judge Blake's return.

I should state at this point that it is my interpretation of N.J.S. 2A:156A-14 and the interpretation of this office that there was no legal obligation to seal any of the original tapes obtained under the July 5 and August 11 orders until after the termination of the second extension on the second

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renewal on October 9. Nevertheless, in view of the number of original tapes which were ready for sealing, we requested the issuing judge to seal portions of the tapes prior to that date even though this procedure necessitated the preparation of additional sealing orders.

An additional 24 tapes authorized by the order of August 11 and terminating on August 31 were prepared for sealing. Judge Blake's office was contacted for an appointment and on September 13, by separate orders, he ordered sealed both the original group of 90 tapes and the group of 24 tapes.

On Sunday, October 9, the date interceptions under the August 31 order and extensions terminated, Investigator Duffy was assigned to prepare the third group of 21 reels for sealing. This work was completed between Monday, October 10 and Friday, October 14. During that week, Investigator Duffy contacted Judge Blake's office and was given an appointment for Monday, October 17. On that date, the issuing judge ordered the final group of tapes from the first wiretap period sealed.

The second period of wiretaps terminated on January 28, 1978. From that date until January 31, all efforts of the Narcotics Strike Force were directed toward other aspects of the case. Search and arrest warrants were prepared and executed. On Monday, January 30, Lt. Doherty and I prepared and processed criminal charges against individuals arrested in New Jersey. The defendants were arraigned before the Honorable Joseph P. Hanrahan, Criminal Assignment Judge, Superior Court of New Jersey, Hudson County. On Tuesday, January 31, Lt. Doherty began to duplicate the tapes and prepare them for sealing. That evening, I called Judge Blake at his home in Jersey City, New Jersey, and informed him that Lt. Doherty was pre-

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paring the tapes for sealing. Judge Blake directed me to complete this process and contact him at that time for a sealing date. The tapes were ready for sealing on or about Tuesday, February 7. The following day, February 8, Lt. Doherty sealed the tapes according to the procedures previously established by Judge Blake and contacted his office for an appointment. On February 9, Judge Blake ordered the final group of tapes sealed.

8. Throughout the period of the wiretap, original tapes that were not yet sealed were stored in secured facilities at the Office of the Narcotics Strike Force until the time that they were removed for duplication or sealing.

9. I have participated in wiretap investigations in New Jersey for approximately seven years. During that time the sealing procedures used in this investigation have been followed and never has there been any irregularity as a result. I am aware of no such problems in the present case. Moreover, I was keenly aware of my statutory duty to seal the tapes immediately and I did not countenance unnecessary delay. Except for the time necessary to prepare duplicate tapes and paperwork and to scheduled appointments with the issuing judge, all tapes were sealed immediately.

Dated: Jersey City, New Jersey  
May 17, 1978.

.....  
JACK HILL  
Assistant Hudson County Prosecutor

**Statutes and Rules Involved****Title 18 U.S.C. Section 2518(8)(a) (in part)**

Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recording shall be wherever the judge orders. . . . Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

**New Jersey Statutes 2A: 156A-14 (in part)**

Immediately upon the expiration of the order or extensions or renewals thereof, the tapes, wires or other recordings shall be transferred to the judge issuing the order and sealed under his direction. Custody of the tapes, wires or other recordings shall be maintained wherever the court directs. . . . Duplicate tapes, wires or other recordings may be made for disclosure or use pursuant to . . . this act. The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire or oral communication, or evidence derived therefrom, under . . . this act.

**Title 18 U.S.C. Section 2518(5)**

No order entered under this section may authorize or approve the interception of any wire or oral communica-

*Statutes and Rules Involved*

cation for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

**New Jersey Statutes 2A: 156A-12(f) (in part)**

In no case shall an order entered upon this section authorize the interception of wire or oral communications for any period exceeding twenty days. Extensions or renewals of such an order may be granted for two additional periods of not more than ten days.

**New Jersey Statutes 2A: 156A-10(f) (in part)**

Upon consideration of an application, the judge may enter an ex parte order . . . authorizing the interception of a wire or oral communication, if the court determines on the basis of the facts submitted by the applicant that there is or was probable cause for belief that:

....

*Statutes and Rules Involved*

In the case of an application, other than a renewal or extension, for an order to intercept a communication of a person or on a facility which was the subject of a previous order authorizing interception, the application is based upon new evidence or information different from and in addition to the evidence or information offered to support the prior order, regardless of whether such evidence was derived from prior interceptions or from other sources.

**Order Denying Petition for Rehearing  
in Court of Appeals**

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of October, one thousand nine hundred and Seventy-nine.

Present:

HON. WILFRED FEINBERG,  
HON. WILLIAM H. TIMBERS,  
HON. THOMAS J. MESKILL,

*Circuit Judges.*

78-1366  
78-1370  
78-1378  
78-1379  
78-1398

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

ANTONIO CRUZ VAZQUEZ, BENITO LUIS CORTINA, a/k/a "Benito Valdez", a/k/a "Benny", ANTONIO GONZALEZ, ANDRES RENEE RAPPARD, JOSE DE LA FE QUINTAS,

*Defendants-Appellants.*

**Order Denying Petition for Rehearing  
in Court of Appeals**

A petition for a rehearing having been filed herein by counsel for the appellants

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ A. DANIEL FUSARO

A. Daniel Fusaro,

*Clerk.*

United States Court of Appeals

FILED

Oct 5 1979

A. Daniel Fusaro, Clerk  
Second Circuit